(26,844)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 758.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1919.

COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Twenty-seventh Day of September, 1918.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Appellant,

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Kenton Circuit Court, Criminal, Common Law, and Equity Division.

Be it remembered that heretofore to-wit: on the 8th day of August 1917, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals, a transcript of the record, which is in words and figures as follows, to-wit:

2 Pleas before the Honorable the Kenton Circuit Court, at the Court-house, in Covington, on the 13th Day of June, 1917, Honorable F. M. Tracy, Judge Presiding, Criminal, Common Law, and Equity Division.

#3114.

COMMONWEALTH OF KENTUCKY

vs.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, a Corporation Organized under the Laws of the Commonwealth of Kentucky.

Be it remembered, that on the 19th day of February, 1916, the Grand Jury returned the following indictment:

Indictment.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, a Corporation Organized under the laws of the Commonwealth of Kentucky, Defendant.

3 "The Grand Jury of Kenton County, in the name and by the authority of the Commonwealth of Kentucky accuse the

Cincinnati, Covington and Erlanger Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky of the offense of unlawfully running and operating, on the — day of February, 1915, a line of railroad and thereon coaches and cars by electricity on a railroad track within this State without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for the transportation of white and colored passengers on its line of railroad, and without having each coach or car divided into compartments by a good and substantial wooden partition with a door therein, each compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, said defendant being then and there, and at all times mentioned in this indictment a corporation organized under the general railroad laws of this Commonwealth and authorized to operate a line of railroad ten miles in length in Kenton County between Covington and Erlanger and beyond, and having leased to the South Covington and Cincinnati Street Railwas Company, a corporation organized under the laws of the Commonwealth of Kentucky, its line of railroad and all its rights and privileges, and having authorized and permitted the acquisition by the South Covington and Cincin-

4 nati Street Railway Company of all its rights and privileges to operate said line of railroad as aforesaid, the defendant knowing at the time of the making of said lease and the acquisition by the South Covington and Cincinnati Street Railway Company of its rights and privileges that said company would not and did not intend to operate and run separate coaches for white and colored passengers and would not have such separate coaches bearing in some conspicuous place appropriate words in plain letters indicating the race for which they would be set apart, and would not have its coaches divided by good and substantial wooden partitions or otherwise, into separate compartments, each compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, the South Covington and Cincinnati Street Railway Company, and at the time mentioned in this indictment, operating under said lease and acquisition of the rights and privileges of the defendant, said line of railroad without having each separate coach for its white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for white and colored passengers, and without having its coaches divided by a good and substantial wooden partition, or other partition with a door therein, said compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart,

5 committed in manner and form as follows, to-wit:

That the said Cincinnati, Covington and Erlanger Company, an interurban railroad Company, is incorporated under the

general railroad laws of this Commonwealth, and was at all times mentioned in this indictment authorized to construct a railroad ten miles in length in the County and State aforesaid, between Covington and Erlanger and beyond, and was authorized under, and was at all times mentioned herein, a corporation under the general laws of this Commonwealth; that after said defendant had condemned and acquired land for its track between the City of Covington and the Lexington Pike at a point near the Buttermilk Pike in said County, said defendant leased to the South Covington and Cincinnati Street Railway Company its rights and privileges, and brought about the acquisition by the South Covington and Cincinnati Street Railway Company of its rights and privileges to operate said line of railroad. That the defendant was at all times mentioned herein, the lessor of said line of railroad and the South Covington and Cincinnati Street Railway Company the lessee of same; that the defendant leased said railroad and permitted and brought about the acquisition of its rights and privileges knowing that the South Covington and Cincinnati Street Railway Company would not operate and run separate coaches for its white and colored passengers and would not have separate coaches for the transportation of white and colored passengers on said line of railroad to bear in

6 some conspicuous place appropriate words in plain letters indicating the race for which they were set apart, and would not have its coaches divided by a good and substantial wooden partition or otherwise into compartments bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart. That the South Covington and Cincinnati Street Railway Company under said lease, by virtue of the same, and by the acquisition of the rights and privileges of the defendant company, the defendant company knowing the intended method of operation by the South Covington and Cincinnati Street Railway Company as above set out, did on the — day of February, 1915, operate said line of railroad from the City of Covington to the Lexington Pike at a point near the Buttermilk Pike, and that the said South Covington and Cincinnati Street Railway Company, a corporation duly organized under the laws of this Commonwealth, as aforesaid, and actually authorized under its lease and acquisition of the rights and privileges of the defendant to operate a line of railroad ten miles in length between Covington and Erlanger and beyond, in this County and State, and being then and there the lessee and owner of the rights and privileges of the said defendant, and in control of the said defendant, which was at all times mentioned herein, authorized to construct a line of railroad ten miles in length between Covington and Erlanger and beyond, did on the — day of February, A. D. 1915, and within twelve months next before the finding of this indictment, said defendant having theretofore know-

7 ingly permitted and authorized the South Covington and Cincinnati Street Railway Company so to do, as hereinabove set out, unlawfully operated a line of railroad and ran a railroad coach thereon by electricity in this County and State on a line of railroad extending from the City of Covington to the Lexington

Pike at a point near the Buttermilk Pike in Kenton County, Kentucky, without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart and without furnishing separate coaches for white and colored passengers, without having its coaches divided into compartments by a good and substantial wooden partition, or any partition, with a door therein, bearing in each compartment in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

(Signed) STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

Witnesses:
Dr. J. P. Riffe, Erlanger, Ky.
S. W. Adams, Erlanger, Ky.
Stephens L. Blakely, Covington, Ky.
John B. Dillon, Covington, Ky.
A. A. Shearer, Erlanger, Ky.

8 Thereupon on the same day, a Summons issued and was afterwards returned as follows:

Summons.

THE COMMONWEALTH OF KENTUCKY:

To any Sheriff, Coroner, Jailer, Constable, Marshal, or Policeman in this State:

You are commanded to summon Cincinnati, Covington and Erlanger Railway Company, a corporation to appear at the Kenton Circuit Court, at Covington, on the 9th day of March, 1916, to answer an indictment for a misdemeanor pending against it in said court.

Given under my hand as clerk of said court, this 19th day of February, 1916.

H. G. KLOSTERMANN, *Clerk,*
By CHAS. F. DROEGE, *D. C.*

Return.

Executed the within Summons February 21st, 1916, on Cincinnati, Covington and Erlanger Railway Company, by delivering a true copy hereof to W. W. Freeman, President of Cincinnati, Covington and Erlanger Railway Company.

JOHN ALLISON,
Sheriff, Kenton Co.,
By THOS. KENNEY, *D. S.*

Order Filing Motion for Trial.

At a sitting of said Court on March 14, 1916:
"Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."
STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

9 ERNST, CASSATT & COTTLE, *Contra.*

Order Setting Case for Trial May 2, 1916.

At a sitting of said Court on March 20, 1916.
"This case is set for trial on May 2, 1916."

Order Entering Demurrer to Indictment, Court Hears Argument, and Case Submitted.

At a sitting of said Court on May 2, 1916:
"Defendant entered demurrer to indictment. The Court hears argument and case is submitted."

Court Files Opinion, and Order Overruling Dem. to Indictment.

At a sitting of said Court on June 21, 1916:
"The Court files an opinion. The Demurrer to the indictment is overruled."

Order Filing Motion for Trial.

At a sitting of said Court on June 23, 1916:
"Plaintiff filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."
STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

ERNST, CASSATT & COTTLE, *Contra.*

Order Filing Motion for Trial.

At a sitting of said Court on August 2, 1916:
"Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."

STEPHENS L. BLAKELY,
Attorney for the Commonwealth.

10 ERNST, CASSATT & COTTLE, *Contra.*

Order Setting Case for Trial on Nov. 21, 1916.

At a sitting of said Court on October 2, 1916:
"This case is set for trial on November 21, 1916."

Order for a Subpœna Duces Tecum.

At a sitting of said Court on November 18, 1916:
"The Commonwealth filed in the Clerk's office two motions for a subpœna duces tecum for Polk Lafoon and W. P. Horton, and it is ordered that Polk Lafoon and W. P. Horton, are ordered to appear on November 21st, 1916, at 9:30 A. M. and bring with them all records, books and papers in their possession under their control and in their custody showing any agreement, understanding, or contract between the South Covington and Cin'ti Street Railway Company and the Covington, Cincinnati and Erlanger St. Ry. Company, as to the method of operation of street cars by said Company, and also records showing the number of cars operated over what is known as the Ft. Mitchell line in Com'th of Kentucky, during month- of February and March, 1915."

Order Filing Motion for Trial.

At a sitting of said Court on March 5, 1917:
"The Commonwealth filed in the clerk's office a motion for trial."

Said Motion is as follows:

Motion.

"The Commonwealth moves for trial."

STEPHENS L. BLAKELY,
Attorney for the Com'lth.

ERNST, CASSATT & COTTLE, *Contra.*

11 *Order Continuing Motion for Trial.*

At a sitting of said Court on March 19, 1917:
"Commonwealth's motion for trial is continued."

Order Setting for Hearing on Motion to Dismiss Indictment.

At a sitting of said Court on May 2, 1917:
"The Court hears oral arguments. Defendant offered in open Court motion to dismiss indictment, to which the Commonwealth objects. Said objection is overruled and a motion filed to which the Commonwealth excepts."

Said Motion is as follows:

Motion.

"Now comes the defendant, at the close of all the evidence, and moves the Court for the dismissal of the indictment and the acquittal of the defendant on the following grounds:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein, and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article 1, Section VIII, of the Constitution of the United States.

12 3. That defendant was not at the time covered by the indictment running or otherwise operating a railroad within the meaning of the Statute of Kentucky upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Submitting Case.

At a meeting of said Court on the same day, May 2, 1917:
"This case is submitted."

Order Filing Brief.

At a sitting of said Court on May 17, 1917:
"Defendant filed in the clerk's office a Brief."

Order Filing Opinion and Judgment.

At a sitting of said Court on June 13, 1917:
"The Court files an opinion. The law and facts being submitted to the court it is adjudged that the defendant is guilty as charged in the indictment. The defendant will pay a fine of $500.00 to which the defendant excepts."

Order Filing Motion for New Trial.

At a sitting of said Court on June 15, 1917:
"Defendant filed in open court a Motion for new trial."

Said Motion is as follows:

Motion.

"Now comes the defendant and moves that the finding and judgment of the court be set aside and for a new trial on the following grounds:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The court erred in overruling the motion of the defend-
13 ant at the close of all the evidence for the dismissal of the indictment, and the acquittal of the defendant on the following grounds, and each of them:

1. That the Statute of Kentucky under which the indictment is made or drawn, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII, of the Constitution of the United States.

2. That the Statute of Kentucky under which the indictment is made if held applicable to the case made by the indictment herein and the evidence offered in support thereof, is an unlawful and unreasonable interference with and regulation of interstate commerce, and is in violation of Article 1, Section VIII of the Constitution of the United States.

3. That defendant was not at the time covered by the indictment, running or otherwise operating a railroad within the meaning of the Statute of Kentucky, upon which the indictment herein is founded.

4. That material allegations of the indictment are not supported by sufficient evidence, nor by any evidence.

Wherefore defendant prays that the verdict and judgment of the Court be set aside and a new trial granted."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Filing Stipulation.

At a sitting of said Court on July 24, 1917:
"Parties filed in the clerk's office a Stipulation."

14 Said stipulation is as follows:

Stipulation.

"It is stipulated that the bill of evidence and exceptions in the case of Commonwealth of Kentucky vs. The South Covington and Cincinnati Street Railway Company, No. 3094 on the docket of this court shall be considered a part of this transcript without being attached hereto."

STEPHENS L. BLAKELY,
Attorney for the Plaintiff.
ERNST, CASSATT & COTTLE,
Attorneys for the Defendant.

Order Overruling Motion for New Trial and Order Filing Motion for Arrest of Judgment.

At a sitting of said Court on June 25th. 1917:
"Defendant's motion for new trial is overruled, to which the defendant excepts. Defendant filed in open Court Motion for Arrest of Judgment."

Said Motion is as follows:

Motion.

"Defendant moves the Court to arrest the judgment in this cause because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Overruling Motion for Arrest of Judgment; Prays an Appeal to Court of Appeals, Which is Granted.

At a sitting of said Court on the same day, June 25, 1917:
"The Motion for Arrest of Judgment is overruled, to which the defendant excepts and prays an appeal to the Court of Appeals, which is granted."

15 On June 27th., 1917, the defendant executed the following Supersedeas Bond:

Supersedeas Bond.

COMMONWEALTH OF KENTUCKY, Plaintiff,

VS.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY CO., Defendant.

We undertake that the defendant, The Cincinnati, Covington and Erlanger Railway Company, will pay to the Commonwealth of Kentucky, all costs and damages that shall be adjudged against said defendant on the appeal from the judgment of said Court, rendered June 13th., 1917, for Five Hundred Dollars ($500.00); also that said defendant will satisfy and perform the said judgment appealed from, if affirmed, and any judgment or order which the Court passing upon said appeal may render or order to be rendered by the inferior Court, not exceeding in amount or value the said judgment appealed from; also that said defendant will satisfy all rents, hire or damage accruing during the pendency of said appeal, upon or to any property of which said defendant may be kept out of possession by reason of said appeal.

Witness our hands, this June 27th, 1917.

THE CINCINNATI, COVINGTON AND ERLANGER RWY. CO.,
By ERNST, CASSATT AND COTTLE, *Attorneys.*
AMERICAN SURETY COMPANY OF NEW YORK,
16 By U. J. HOWARD, *Resident Vice President.*

Attest:

[SEAL.] ED. E. WALKER,
Resident Asst. Secretary.

Approved:

H. G. KLOSTERMANN, *Clerk,*
By R. T. VON HOENE, *D. C.*

Order Filing Bill of Evidence and Exceptions and Order Filing Schedule.

At a sitting of said Court on Jule 24th. 1917:

"Defendant filed in open Court Bill of Evidence and Exceptions, and the Court takes time on the motion to sign the same. Defendant filed in the clerk's office a Schedule."

Said Schedule is as follows:

Schedule.

"The Clerk will copy the entire record herein for an appeal to the Court of Appeals."

ERNST, CASSATT & COTTLE,
Attorneys for Defendant.

Order Signing Bill of Evidence; Same is Made a Part of the Record Without Being Spread upon the Order Book.

At a sitting of said Court on July 27th., 1917:
"The Court signed in open Court a Bill of Evidence and Exceptions heretofore tendered and the same is made a part of the record without being spread upon *on* the Order Book."

17-74 Kenton Circuit Court.

I, H. G. Klostermann, Clerk of said Court, certify that this and the preceding fifteen pages contain a true and complete transcript of the record in the cause styled in the caption.

Given under my hand as Clerk of said Court, this 6th. day of August, 1917.

H. G. KLOSTERMAN,
Clerk of the Kenton Circuit Court,
By CHAS. DROEGE, *D. C.*

* * * * * * *

75 Be it remembered that at a Court of Appeals held in and for the Commonwealth aforesaid, at the Capitol at Frankfort, on the 21st., day of December 1917, the following Order was entered, to-wit:

Kenton.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO.

VS.

COMMONWEALTH.

Came the appellant by counsel, and filed notice, and grounds and moved the Court to grant an oral argument herein, which motion is submitted.

The motion for oral argument filed by the foregoing order is in words and figures, following, to-wit:

76 Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Notice of Application for Oral Argument.

You are hereby notified that counsel for appellants have this day filed a motion for oral argument in the above entitled cases.

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE,
Attys. for Appellants.

77 Covington, Ky., December —, 1917.

Service of the above notice is hereby acknowledged and the undersigned consents to the granting of the motion.

STEPHEN S. BLAKELY.

78 Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO., Appellant,

vs.

COMMONWEALTH OF KENTUCKY, Appellee.

Application for Oral Argument.

Now come the appellants and move the court that the above entitled cases be passed for oral argument and be set for hearing at the convenience of the court.

Statement.

These cases are appeals from the Kenton Circuit Court. They were heard together in the court below and by stipulation filed in this court are heard together here.

79 Appellan's were charged by simultaneous indictment in the Kenton Circuit Court with a violation of Section 795 of the Kentucky Statutes, which is in part as follows:

"Any railroad company or corporation * * * running or otherwise operating railroad cars or coaches * * * who may be now or may hereafter be engaged in running or operating any of the railroads of this state either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railway.

It is not contended that the section quoted would of itself apply to either of the appellants, but it is claimed to be made applicable by Section 842*a*, paragraph 1, of the Kentucky Statutes, which is as follows:

"All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, *so far as practicable*, and shall have the same rights, powers and privileges as *is* now granted to or conferred upon railroad corporations existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted." (Italics ours.)

A jury was waived and the law and facts submitted to the court which found both defendants guilty.

The appellant, The South Covington & Cincinnati Street Railway Co. is a street railway Company organized under a special charter granted January 25, 1876, and having authority to construct and operate street railways in the City of Covington and vicinity.

80 Since the time of its organization it has been engaged in the operation of street railway lines in Covington and Newport and adjacent towns and territory, as appears from a plat attached to the opening brief for appellants.

The appellant, Cincinnati, Covington & Erlanger Railway Co. is a corporation organized under the general railroad laws of the State of Kentucky prior to the passenger of #842*a* above referred to, and having authority to construct and operate an electric railway from the City of Covington to the town of Erlanger, a distance of about six miles, and to such further point beyond Erlanger as my be determined.

The road of the Erlanger Company has been constructed from the City of Covington to a point just beyond the suburban town called Ft. Mitchell, a total distance of 4.75 miles.

The South Covington & Cincinnati St. Ry. Co. furnished the money to build the road and at the time covered by the indictment was operating on said road a branch or part of its street railway system, operating its ordinary street cars by continuous trip over said line and through Covington and Cincinnati, charging a five cent fare, stopping at all street corners and road intersections, giving universal transfers and carrying no freight or express matter.

It seems clear from the Statutes quoted that separate coaches or

compartments for colored passengers are required only in the case of companies "engaged in running or operating any of the railroads of this State."

81 This court held in Louisville R. R. Co. vs. Commonwealth, 130 Ky. 738, that the Statute applies to an interurban railroad but does not apply to a "street railway operating within the territory to which its charter confines it."

It was also held in that case that the test of guilt was the actual character of the operation and not the charter power of the defendant.

In the cases at bar the Commonwealth did not show, nor did it appear that at the time covered by the indictment an interurban railroad was being operated over the tracks in question by either company, but both companies were found guilty, apparently on the theory that as the Erlanger Company which owned the tracks, was authorized to operate an interurban railroad, any company operating over its tracks was bound to furnish separate coaches or compartments for colored people, irrespective of the character of the actual operation.

The judgments below seem to be directly at variance with the principle of the decision of this court in Louisville R. R. Co. v. Commonwealth, 130 Ky. 738, and if applied generally would work a great hardship not only upon appellants, but upon other street railway systems which have extended some of their lines into outlying suburban territory.

Because of the practical hardship of the judgments below and what we believe to be the erroneous construction of the statutes, and also because of the importance of this question in the State

82 at large, we request that an oral argument be granted.

J. C. W. BECKHAM,
ERNST, CASSATT & COTTLE.
Attys. for Appellants.

83 Be it remembered that heretofore, to-wit, at a Court of Appeals held as aforesaid on the 7th day of January 1918, the following order was entered, to-wit:

Kent.

CINCINNATI, COVINGTON & ERLANGER RY. CO.

vs.

COMMONWEALTH.

The Court being sufficiently advised the motion for oral argument is sustained, and the case continued until the Spring Term for Argument.

Be it remembered that at a Court of Appeals held as aforesaid on the 24th day of May, 1918, the following order was entered, to-wit:

CINCINNATI, COVINGTON & ERLANGER RY. CO.

vs.

COMMONWEALTH KENTUCKY.

This case coming on to be heard, was argued by Stephen L. Blakely for the Appellee, and A. J. Cassatt for the appellant, and submitted.

Be it remembered that at a Court of Appeals, held in and for the Commonwealth of Kentucky at the Capitol at Frankfort, on the 27th day of September, 1918, the following order and Judgment was entered, to-wit:

Kenton Circuit Court, Criminal, Common Law, and Equity.

CINCINNATI, COVINGTON AND ERLANGER RY. CO., Appellant,

v.

COMMONWEALTH OF KENTUCKY, Appellee.

84-97 The Court being sufficiently advised, it seems to it, there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed, and that the appellee recover of the appellant 10 per cent damages on the amount of the Judgment superseded herein, which is ordered certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And at the same time the Court delivered an opinion herein in words and figures as follows, to-wit:

* * * * * * *

98 Be it remembered, that afterwards, to-wit, on the 8th day of November, 1918, the appellant, Cincinnati, Covington & Erlanger Railway Company, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors which is in words and figures as follows, to-wit:

99 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the proceedings and in the final judgment of the Court of Appeals

of the State of Kentucky in the above entitled case there is manifest error in this, to-wit:

1. The Court of Appeals erred in holding that Sections 795, 797 and 842*a* of the Kentucky Statutes are not an unlawful and unreasonable interference with and regulation of interstate commerce in conflict with and in violation of the provisions of Article I, Section 8 of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that Sections 795, 797 and 842*a* of the Kentucky Statutes were applicable to the case made by the indictment herein and the evidence offered in support thereof, and not an unlawful and unreasonable interference with and regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

3. Said court erred in holding that the operation of the particular car, for which operation this plaintiff in error was found guilty of a criminal offense under Sections 795 and 797 of the Kentucky Statutes and punished for said alleged crime, was intrastate com-
100 merce, over which the State of Kentucky had power to exercise the authority asserted by said sections of the Kentucky Statutes.

4. Said court erred in holding that the regulation and control asserted by appellee (defendant in error) over the acts and doings of appellant (plaintiff in error) as shown by the record, and upheld and approved by the judgment of the Court of Appeals, were not and are not unlawful and unreasonable interference with the regulation of interstate commerce and not in violation of Article I, Section 8 of the Constitution of the United States.

5. Said court erred in entering judgment for defendant in error (appellee) and in affirming the judgment in its favor of the Kenton Circuit Court.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff in Error.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

100½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Assignment of Errors. Filed Nov. 8, 1918. R. W. Keenon, C. C. A. Ernst, Cassatt & Cottle, Attorneys for Plaintiff in Error.

101 And on said date, to-wit, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Petition for a Writ of Error and which is attached hereto and is as follows:

102 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable W. E. Settle, Chief Justice of the Court of Appeals of Kentucky:

Plaintiff in error, The Cincinnati, Covington and Erlanger Railway Company, alleges that on the 27 day of September, 1912, the Court of Appeals of the State of Kentucky entered a final order and judgment herein in favor of the defendant in error, The Commonwealth of Kentucky, in which final order and judgment and the proceedings at the trial thereof in this cause certain errors were committed to the prejudice of the plaintiff in error, all of which will appear more in detail from the assignment of errors which is filed with this petition.

That said Court of Appeals of the State of Kentucky is the highest court in said State in which a decision in said suit could be had and there was drawn in question therein the validity of statutes of, or an authority exercised under said State, on the ground that the same were repugnant to the Constitution of the United States and the decision therein was in favor of their validity.

103 Wherefore plaintiff in error prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of and that a transcript of the record herein, duly authenticated, may be sent to the Supreme Court of the United States.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE,
Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 8 day of November, 1918, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $1200.00. Dated at Frankfort, Kentucky, this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed in my office this 8th day of November, 1918.
RODMAN W. KEENON,
Clerk of the Court of Appeals
of the State of Kentucky,
By W. B. O'CONNELL, *Deputy Clerk.*

103½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Petition for Writ of Error from the Supreme Court of the United States. Filed Nov. 8, 1918. R. W. Keenon, C. C. A. Ernst, Cassatt & Cottle, Attorneys for Plaintiff in Error.

104 And on said date, to-wit, November 8, 1918 there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States and the order allowing same by the Chief Justice of the Kentucky Court of Appeals, and which are attached hereto as follows, to-wit:

105 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The Cincinnati, Covington and Erlanger Railway Company, a corporation under the laws of Kentucky, and the Commonwealth of Kentucky, wherein was drawn in question the validity of certain statutes of, or authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said The Cincinnati, Covington and Erlanger Railway Company, as by its complaint appears, we being will-

106 ing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of Dec., 1918, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said Supreme Court, the 8th day of Novr., in the year of our Lord One Thousand Nine Hundred and 18.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk U. S. District Court, Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by
W. E. SETTLE,
Chief Justice, Kentucky Court of Appeals.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

106½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

107 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Allowance of Writ of Error.

This cause coming on to be heard on the petition of The Cincinnati, Covington and Erlanger Railway Company, plaintiff in error (appellant) for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon

examination of said petition and the record in said matter and desiring to give the petitioner opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States, and the plaintiff in error having presented a bond in the sum of $1200.00, with American Surety Co. of N. Y. as surety, to operate as its supersedeas, the same is hereby approved.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

107½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Allowance of Writ of Error. Filed Nov. 8, 1918, R. W. Keenon, C. C. A.

108 And on said date, November 8, 1918, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error Bond, and which is in words and figures as follows, to-wit:

109 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Bond.

Know all men by these presents, that we, The Cincinnati, Covington and Erlanger Railway Company, as principal, and American Surety Co. of N. Y., as surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Twelve Hundred Dollars to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of November, 1918.

Whereas the plaintiff in error hath prayed a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of

error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
By ERNST, CASSATT & COTTLE,
Its Attorneys.
AMERICAN SURETY CO. OF N. Y.,
Per D. D. SMITH,
Atty-in-fact.

I hereby approve the foregoing bond and surety this November 8th, 1918.

W. E. SETTLE,
Chief Justice.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

109½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Bond. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

110 And afterwards, to-wit, on the 8th day of November 1918, there was filed in the Clerk's office of the Court of Appeals, the original citation with acceptance of service thereon, and which is hereto attached as follows:

111 Court of Appeals of the State of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Plaintiff in Error (Appellant),

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error (Appellee).

Citation.

To the Commonwealth of Kentucky:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein The Cincinnati, Covington and Erlanger Railway Company is appellant (plaintiff in error) and you are appellee (defendant in error) to show cause, if any there be, why the judgment against appellant (plaintiff in error) as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Settle, Chief Justice of the Court of Appeals of Kentucky, this 8 day of November, 1918.

W. E. SETTLE,
Chief Justice.

Copy of the within citation received this 8th day of November, 1918, and service accepted.

CHARLES H. MORRIS,
Attorney General, Kentucky.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

111½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington & Erlanger Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky, Defendant in Error. Citation. Filed Nov. 8, 1918. R. W. Keenon, C. C. A.

112 And afterwards, to-wit, on the 8th day of November, 1918, there was filed in the office of the Clerk of the Court of Appeals, the original præcipe with acceptance of service thereon, and which is hereto attached as follows:

113 The Court of Appeals of Kentucky.

THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY, Appellant (Plaintiff in Error),

vs.

THE COMMONWEALTH OF KENTUCKY, Appellee (Defendant in Error).

Precipe.

To the Clerk of the Court of Appeals of Kentucky:

Please make a transcript of the record and proceedings in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, and include therein the following:

1. The entire record in this cause including bill of exceptions.
2. Opinion of Court of Appeals.
3. The assignment of errors, petition for writ of error, order allowing same, bond, order approving same, citation and return of service of same, this precipe and the return of service of same.

ERNST, CASSATT & COTTLE,
Attorneys for the Above-named Appellant (Plaintiff in Error), The Cincinnati, Covington & Erlanger Railway Company.

Copy of the above precipe received and service of same hereby accepted and acknowledged this 8th day of November, 1918.

CHARLES H. MORRIS,
Attorney General of Kentucky, Attorney for Appellee (Defendant in Error), The Commonwealth of Kentucky.

Filed Nov. 8, 1918.
R. W. KEENON, *C. C. A.*

113½ [Endorsed:] Court of Appeals of Kentucky. The Cincinnati, Covington and Erlanger Railway Co., Appellant, vs. The Commonwealth of Kentucky, Appellee. Precipe. Ernst, Cassatt & Cottle, Attorneys for Appellant.

114 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record in the case of Cincinnati, Covington & Erlanger Railway Company vs. The Commonwealth of Kentucky, with all things touching the same, as appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, Kentucky, on this the 20th day of November, 1918.

[Seal Kentucky Court of Appeals.]

R. W. KEENON,
Clerk of the Court of Appeals of Kentucky.
By W. B. O'CONNELL, *D. C.*

Fee for this transcript 35.00.

115 In the Supreme Court of the United States, October Term, 1918.

No. 758.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

Stipulation.

Whereas, this case was tried below with the case of The South Covington and Cincinnati Street Railway Company vs. Common-

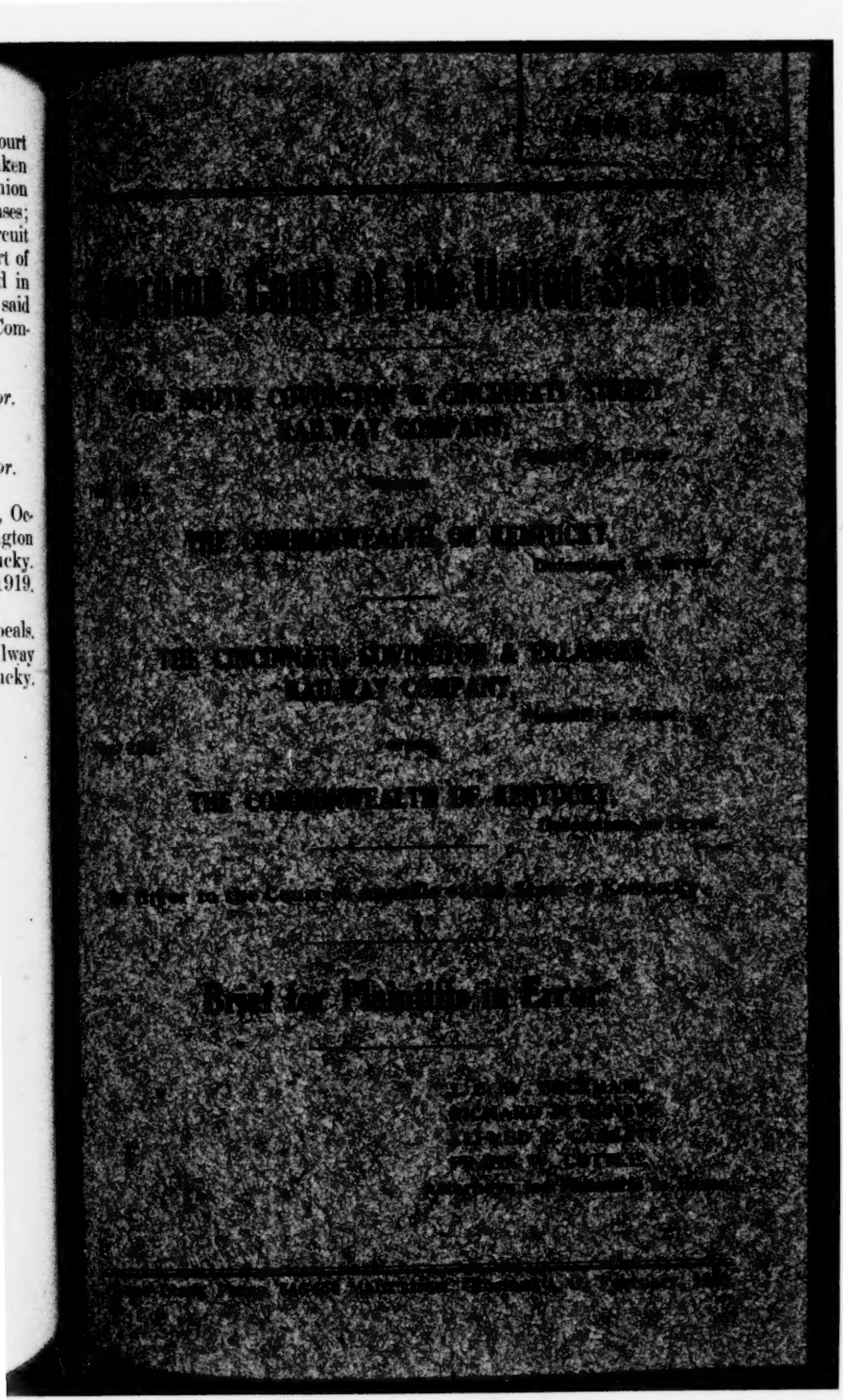
wealth of Kentucky, No. 757, October Term, 1918, Supreme Court of the United States, and the bill of evidence and exceptions taken in the Circuit Court of Kenton County, Kentucky, and the opinion of the Court of Appeals of Kentucky are the *the* same in both cases;

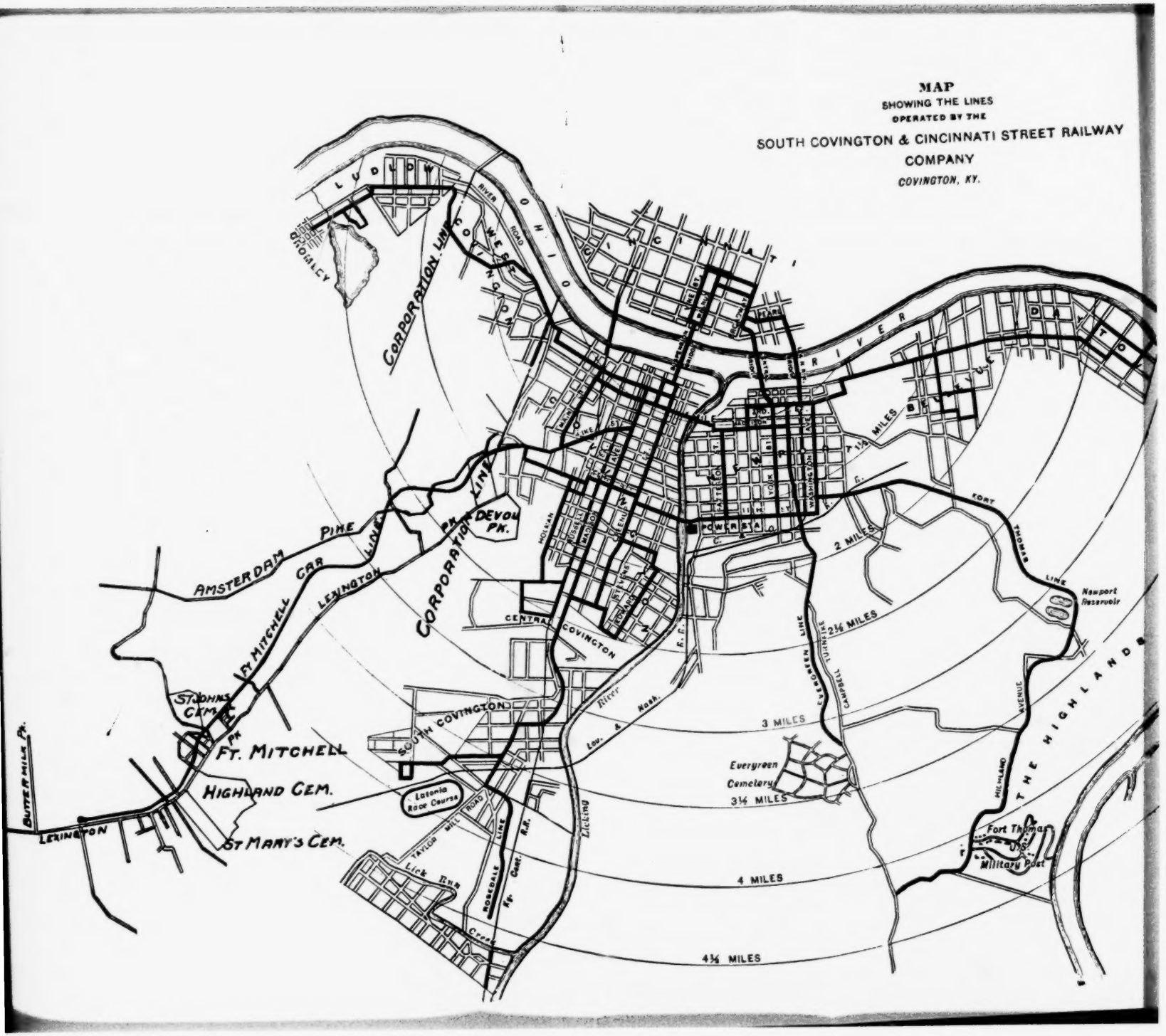
It is agreed that the bill of evidence and exceptions in the Circuit Court of Kenton County, Kentucky, and the opinion of the Court of Appeals of Kentucky, may be omitted from the printed record in this case and reference for same had to the printed record in the said case of The South Covington and Cincinnati Street Railway Company No. 757.

ALFRED C. CASSATT,
Attorney and Solicitor for Plaintiff in Error.
CHARLES H. MORRIS,
Attorney General of Kentucky and
Solicitor for Defendant in Error.

116 [Endorsed:] File No. 26,844. Supreme Court U. S., October Term, 1918. Term No. 758. Cincinnati, Covington & Erlanger Ry. Co., Pl'ff in Error, vs. Commonwealth of Kentucky. Stipulation to omit parts of record in printing. Filed Jan. 29, 1919.

Endorsed on cover: File No. 26,844. Kentucky Court of Appeals. Term No. 758. The Cincinnati, Covington & Erlanger Railway Company, plaintiff in error, vs. The Commonwealth of Kentucky. Filed December 3d, 1918. File No. 26,844.




MAP
SHOWING THE LINES
OPERATED BY THE
SOUTH COVINGTON & CINCINNATI STREET RAILWAY
COMPANY
COVINGTON, KY.
LUDLOW
RIVER ROAD
OHIO
CINCINNATI
RIVER
CORPORATION LINE
FORT WRIGHT
DIXIE HIGHWAY
BEECH GROVE
1½ MILES
2 MILES
FORT THOMAS LINE
Newport Reservoir
AMSTERDAM PIKE
CAR LINE
BY MITCHELL
LEXINGTON
CORPORATION LINE
PK.
DEVOU PK.
HOLMAN
RUSSELL
MADISON
CENTRAL
COVINGTON
2½ MILES
EVERGREEN LINE
CAMPBELL TURNPIKE
ST. JOHNS CEM.
BUTLER HILL PK.
PK.
FT. MITCHELL
HIGHLAND CEM.
ST MARY'S CEM.
LEXINGTON
SOUTH COVINGTON
Low. & Nash.
River
3 MILES
Evergreen Cemetery
3½ MILES
HIGHLAND AVENUE
THE HIGHLANDS
Latonia Race Course
TAYLOR MILL ROAD
Lick Run
ROSEDALE LINE
Ft. Cent. R.R.
Creek
LICKING
4 MILES
Fort Thomas
U.S. Military Post
4½ MILES

INDEX.

LIST OF CASES.

Supreme Court of the United States

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error,

No. 252. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

THE CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY,
Plaintiff in Error,

No. 253. *vs.*

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiffs in Error.

STATEMENT OF CASE.

These are proceedings in error to reverse judgments of the Court of Appeals of Kentucky which affirmed judgments of the Circuit Court of Kenton County, Ken-

tucky, convicting plaintiffs in error of violations of the Kentucky Separate Coach Law.

Plaintiffs in error were charged by separate indictments under the same date in the Kenton Circuit Court.

The two cases were by agreement heard together without a jury in the Circuit Court and were heard together in the Kentucky Court of Appeals, but on separate records.

The record in *The South Covington & Cincinnati Street Railway Co.* v. *Commonwealth of Kentucky*, No. 757 October Term, 1918, in this court, contains the bill of evidence (page 11) upon which both cases were heard. The bill of evidence is also contained in the original record filed in this court in *Cincinnati, Covington & Erlanger Railway Co.* v. *Commonwealth of Kentucky*, No. 758 October Term, 1918, but is by agreement omitted as unnecessary in the printed record in that case.

In each case the defendant, by written motion for dismissal of indictment and acquittal, made and filed at the close of the evidence, claimed that the statute of Kentucky under which the indictment was had, and its application to the facts of each particular case, constituted an unlawful and unreasonable interference with interstate commerce in violation of the Federal Constitution (Case No. 757, Rec., pp. 7, 44). The same claim was made on the motion for a new trial (same case page 8) and on argument in the Court of Appeals.

This Federal defense was decided by the Kentucky Court of Appeals adversely to plaintiffs in error (Assignment of Errors, Rec., same case, p. 56).

The principal question involved in this court is the same in both cases and we may therefore confine ourselves in the first instance to *South Covington & Cincin-*

THE LAW.

The indictment was had under Sections 795-801 of the Statutes of Kentucky which are as follows:

"Section 795. *Separate coaches or compartments for white and colored passengers.* Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

"Section 796. *No discrimination in coaches or compartments.* That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

"Section 797. *Misdemeanor-penalty.* That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 795 and 796 shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

"Section 798. *Jurisdiction of circuit courts.* That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

"Section 799. *Duties and powers of conductors of trains.* The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"Section 800. *Penalty imposed on conductors for violation of duty.* That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of Section 799 shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.

"Section 801. *Persons to whom act not applicable.* The provisions of this act shall not apply to employees of railroads or persons employed as nurses, or officers in charge of prisoners [nor shall the same apply to the transportation of passengers in any caboose car attached to a freight train]. (Words in brackets added by amendment of March 15, 1894.)

It is not contended by the Commonwealth that Sections 795-801 would of themselves apply to either of the defendants, but it is claimed that they are made applicable by Section 842a, paragraph 1 of the Kentucky Statutes, which is as follows:

"Section 842a. 1. *Interurban electric railroads placed on same footing as railroads.* All interurban electric railroad companies authorized to construct a railroad ten or more miles in length, heretofore or hereafter incorporated under the general railroad laws of this Commonwealth, shall be under the same duties and responsibilities, so far as practicable, and shall have the same rights, powers and privileges as is now granted to or conferred upon railroad corporations, existing, operated or incorporated under existing laws of this Commonwealth, or under laws that may hereafter be enacted."

The foregoing statutes do not apply to a street railway. The Court of Appeals of Kentucky said in *Louisville Railway Co.* v. *Commonwealth*, 130 Ky., 738:

"A street railway operating within the territory to which its charter confines it, is not required by law to provide separate cars or separate compartments in its cars for the transportation of white and colored passengers."

THE INDICTMENT.

The indictment against the South Covington and Cincinnati Street Railway Co. is to be found on pages 1-3 of the Record and charges the defendant with

> "the offense of unlawfully running and operating a coach or car by electricity on a railroad track on the — day of February, 1915, within this State and county, without causing or having each separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without furnishing separate coaches for white and colored passengers, and without having its coach or car divided by a good and substantial wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart." (Top p. 2.)

CLAIM OF PLAINTIFFS IN ERROR.

The indictment charges the South Covington Company with operating a car on a railroad track in the State of Kentucky without providing a separate compartment or coach for the transportation of colored passengers.

The undisputed evidence shows that the company was engaged solely in the operation of a street railway system whose principal business was interstate commerce —the carriage of passengers between Cincinnati and the

Kentucky cities across the Ohio River; that the car in question, for whose operation the company was indicted, was an ordinary single truck street car seating thirty-two passengers (R., 28), about twenty-one feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and well populated territory adjacent thereto, to a point near Fort Mitchell, a suburb, about five miles distant. Eighty per cent. of the passengers carried were interstate. Not to exceed six per cent. of the passengers carried at any time were colored and on a large proportion of the trips no colored passengers were carried.

Plaintiffs claim that the requirement that such a car so engaged should maintain a separate compartment or carry a separate coach for colored passengers is upon the facts in this case a direct and unreasonable regulation of interstate commerce and that the Kentucky law so construed as to make such requirement is in violation of the interstate commerce clause of the Federal Constitution.

In the State Court the Company defended also on the ground that the separate coach act did not apply to it because it was not a railroad nor an interurban railroad within the meaning of the Statute but was a mere street railway company.

The court below held, however, that one of its lines, namely, the Fort Mitchell or Erlanger line, on which the car in question was operated, was theoretically an interurban line within the meaning of the separate coach act and Section 842a, *supra,* because the portion of that line outside of the city limits of Covington was operated over tracks belonging to The Cincinnati, Covington & Erlanger Railway Co. (the other plaintiff in error)

which was (so the court held) organized as an interurban line.

The court held that although the car in question was an ordinary street car operated as a part of The South Covington & Cincinnati Street Railway Co. system, it must be deemed to be an interurban car for the purposes of this indictment under the statutes quoted above, because for a portion of its interstate trip between Fort Mitchell and Cincinnati it operated over the so-called interurban line of The Cincinnati, Covington & Erlanger Railway Co.

While the decision or judgment of the Kentucky Court of Appeals may be conclusive on the state question, namely, whether the car covered by the indictment was an interurban car for the purposes of the indictment, its judgment is not at all conclusive in this court as to the actual nature of the operation involved, for the purpose of the determination by this court whether the application of the separate coach law to such operation was an illegal regulation of and burden upon interstate commerce.

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

In *Mississippi Railroad Commission* v. *Illinois Central Railroad Co.*, 203 U. S., 335, the court had under consideration an order of a State Railroad Commission stopping interstate trains at stations. The court said on pages 344, 345:

> "In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary to examine the facts upon which they rest and to determine from such examination whether there has been an un-

constitutional exercise of power and an illegal interference by the state or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts."

In *Southern Pacific Co.* v. *Schuyler*, 227 U. S., 601, 611, the court said:

> "and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S., 655, 668; *Creswill* v. *Knights of Pythias*, 225 U. S., 246, 261."

To the same effect are the following cases in which this court held state laws or regulations to be, under the facts in each case, an unconstitutional interference with interstate commerce.

Chicago, Burlington & Quincy Railroad Co. v. *Railroad Commission of Wisconsin*, 237 U. S., 220, in which the court held invalid, under the facts in that case, an order of the Railroad Commission of Wisconsin requir-

ing the railroad company to stop certain trains at the station of Cochran.

Seaboard Air Line Railway Co. v. *Blackwell,* 244 U. S., 310, where the court held invalid the "Blow-Post" law of Georgia under the facts of that case.

Missouri, Kansas & Texas Railway Co. v. *State of Texas,* 245 U. S., 484, where the court held invalid, under the facts of that case, an order of the State Railroad Commission of Texas relative to schedules of trains.

We therefore call the court's attention to the testimony in the record, which is undisputed and which shows the precise nature of the operation involved and the application thereto of the Separate Coach Law of Kentucky.

These cases were tried upon a plea of "not guilty" to the indictment, whose effect as a plea under the Kentucky law is set forth in Section 175 of the Criminal Code, which is as follows:

> The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending to establish a defense, other than a former conviction or acquittal, may be given in evidence under it."

THE FACTS.

Plaintiff in error, The South Covington & Cincinnati Street Railway Co. was incorporated by a Special Act of the General Assembly of Kentucky January 25, 1876 (Rec., p. 12, *et seq.*). The purpose of its incorporation was

> "the construction, operation and management of street railways in the City of Covington and

> vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of." (Rec., 12.)

The charter provided that the company might "by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway or interest therein in Covington, Newport or vicinity."

The company was also authorized, Section 4,

> "to connect with and use the track of any other railway company in the City of Covington and vicinity," etc.

The name of the company as fixed by its charter and its powers as therein set forth, exhibit the purpose of its organization to have been the construction and operation of street railway lines connecting Cincinnati and the Kentucky towns and surrounding territory.

This court held in *South Covington & Cincinnati Street Railway Co.* v. *Covington,* 235 U. S., 537, 545, that the course of business carried on by this company constitutes interstate commerce.

At the time of the indictment herein the company was operating a single system of street railways in Cincinnati, Covington, Newport and vicinity as appears upon a map opposite page 44 of the printed record, a copy of which is appended to this brief.

The particular line of the South Covington & Cincinnati Street Ry. Co. which is involved in this indictment is what is known in the record as the Erlanger or Fort Mitchell line, which appears on the left side of the

map. The history of its construction and operation is as follows:

In 1879, after the system of the South Covington Company had been in operation for more than 25 years, the Cincinnati, Covington & Erlanger Railway Co., hereinafter called the Erlanger Company, was organized under the laws of Kentucky by filing articles of incorporation, of which the third paragraph is as follows:

> "The business of said company shall be the construction, maintenance and operation of a line of railway, not exceeding ten (10) miles long, with a single or double track, and with all the usual and convenient appendages and appurtenances thereunto belonging, including the right to erect, maitain and operate electric poles and wires over and along said railway, and with the privilege of operating a line of telegraph or telephone on and over the line of said railway. Said railway is to be constructed and operated, from the City of Covington, Kenton County, Ky., to the town of Erlanger, in Kenton County, Ky., and to such further point beyond said town of Erlanger as may be hereafter determined upon, and over, along, and upon such bridges, streets, roads, highways and such private property, as said company may by due process of law, acquire the right to lay its tracks and other appliances and appendages upon." (R., 16.)

The town of Erlanger, referred to in the language just quoted, is 6.21 miles from Covington and 8.7 miles from Fountain Square in Cincinnati. As appears below, the line was never built all the way to Erlanger.

The original incorporators of the Erlanger Company were parties interested in the South Covington Company, which became the owner directly or indirectly of

all of the stock of the Erlanger Company, except the qualifying shares of the directors, and furnished the money to build the road. The South Covington Company has at all times retained its ownership of said stock. (R., 28.)

Without any formal agreement or arrangement between the two companies, the South Covington Company constructed the road and has operated its street cars thereon, although the corporate organization of the Erlanger Company has been at all times maintained. (R., 29.)

Shortly after the filing of the articles of incorporation, the track was constructed from a point 600 feet within the corporate limits of Covington at Montague street (where it connected with the then existing street railway tracks of the South Covington Company) to the Highland and St. Mary's Cemeteries, a distance of about 3.75 miles from Covington and was opened for travel in 1902. (R., 20.)

Shortly after the building of the road, the "Ft. Mitchell Country Club" built a club-house and laid out golf links at a point on the line between Covington and the Cemeteries, about three miles from Covington. (R., 34.) A town has grown up about the club and has been incorporated as the town of Fort Mitchell, which is purely suburban to Cincinnati, and has no place of business—not even a drug store or grocery—and no places of amusement, except the golf links. Its population is from 250 to 300. (R., 34.)

There are no other municipalities on the line, and not even a village at the end of the line.

In 1912 an additional mile was constructed from the cemeteries to a point on the Lexington Pike near the

intersection of Buttermilk Pike, making the total length of the line from Fountain Square in Cincinnati, Ohio, to the Buttermilk Pike, about six miles. (R., 20.)

The Erlanger Company did not construct, and never operated, the line. It never owned a power house or cars, or any other equipment. The only tracks constructed on its right of way were those built by the South Covington Company. (R., 20, 21.)

The only cars ever operated over the line were the street cars of the South Covington Company (R., 20-21), and at the time referred to in the indictment (as well as previously) all such cars were operated as a part of the South Covington Street Railway System and in the same manner, for the same fares, with the same transfer rights as on the other parts of the system. (R., 35 *et seq.*)

All cars were operated by continuous trip from Cincinnati to the end of the Ft. Mitchell line. (R., 30.) From Covington to the end of the line—a well populated territory (R., 38)—the cars stop at any road crossing to take on or let off passengers, just as in Newport, Covington and Cincinnati. (R., 37.) A flat fare of five cents is charged, wherever the passenger gets on and whether he rides the entire length of the line, or only to the next street or road crossing, being the same rate of fare as charged on all other parts of the South Covington system. (R., 31, *et seq.*)

The South Covington Company also gives universal transfers from any one of its routes or lines to any other, and the custom applies also to the Erlanger or Ft. Mitchell line. For instance, a passenger is carried from the end of the Ft. Mitchell line at Buttermilk pike to the end of the Ft. Thomas line for a single

five-cent fare, receiving two transfers in the process. Transfers are also given to and from all other lines of the company. (R., 31, *et seq.*)

The only cars used on the line were the regular single truck street cars of the South Covington Company (R., 28), seating thirty-two passengers, and about twenty-one feet in length, inside measurement, being interchanged every day with cars used on other lines of the system. There are no particular cars allotted to this line. (R., 38.)

All the regulations and customs with reference to the operation of cars, and the fares and transfers, in force on the other parts of the South Covington Street Railway system in Kenton and Campbell counties, apply equally to the Ft. Mitchell line. (R., 36.)

The mileage of the Ft. Mitchell route, and the receipts and disbursements thereon, are returned to the Auditor of Public Accounts by the South Covington Company as a part of its return. The assessment is made against the South Covington Company as a unit by the State Board of Valuation and Assessment, and the taxes are paid by the South Covington Company. (R., 36.)

The tangible property, such as the right of way and rails, is assessed by the local authorities, whereas in the case of all railroads and interurban roads, the tangible property is assessed by the Railroad Commission, and not by the local authorities. (R., 36-7.)

The State itself has thus treated the line as a street railway and not as an interurban line.

The company has never operated any freight cars over the line or carried any freight or express matter on its cars, nor has it ever done any business except the carriage of passengers for a five-cent fare, as above described. (R., 37.)

There are some expressions in the opinion of the court below which are, doubtless without intention, wholly misleading. For instance on page 53, the court says:

> "The operation of a train upon this road, while it may be extended into another state, by connecting it with, and operating it upon the track of another company, the fact yet remains, that it is operated, the entire length of the line of the Cincinnati, Covington & Erlanger Railway Company, in the state of Kentucky."

and on page 55 it says:

> "The evidence shows that railroad coaches were operated upon the railroad, without compliance with the requirements of the law, as to separate coaches, or separate compartments therein, and that such operation was by the South Covington & Cincinnati Street Railway Company."

There is no evidence that the South Covington operates either a "train," or a "railroad coach." The undisputed evidence is that the car upon whose operation this indictment is based, like all the other cars operated upon the line, was an ordinary single truck street car, doing an ordinary street car business between Cincinnati and the Kentucky end of the line.

The court below seemed to assume that because the legal title to the portion of the line from Montague Street to Buttermilk Pike is in an interurban company, the operation thereon must be deemed, for the purposes of the separate coach act, to be an interurban operation. The court said on page 54:

> "It can not escape its responsibilities as an interurban railroad, by claiming or undertaking to operate it as a street railroad, or authorizing

any one else to do so, because in the contemplation of the statute and the holdings of this court, exempting street railroads from the application of Section 795, *supra*, it is impossible to operate a street railroad upon its road. It is contended, that the South Covington & Cincinnati Street Railway Company is authorized by its charter to operate a street railroad upon the road of the South Covington, Cincinnati & Erlanger Railway Company but an examination of the charter does not seem to justify this contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute, in its operation."

If the question of the right of the South Covington Company to operate a street railway over the line in question were involved in this indictment, we contend that the record shows that right to be clear. The South Covington Company has ample power under its charter (R., 12), to extend the operation of its street railway line throughout "Covington *and vicinity,*" not only within, but "out of the city." The sections of its charter which we have quoted, give it power to "purchase, lease, consolidate with, acquire, hold or operate any other street railway or interest therein in Covington, Cincinnati, Newport or vicinity" (Sec. 3); "to connect with, and use the track of any other *railway company* in the city of Covington and vicinity," even by a resort to condemnation proceedings (Sec. 4); and to "purchase and hold such real and personal estate, routes, railway tracks * * * as may be deemed requisite for its use." (Sec. 6.) The South Covington & Cincinnati Company is therefore operating, in accordance with its legal rights, a street railway upon the tracks in question.

But the question here is not what kind of a railroad the company had a right to operate, but what kind it did operate. The right of the South Covington Company to operate its interstate street cars over the Ft. Mitchell line has never been challenged. Its street car service has been welcomed and has built up the region served. It has created the suburb of Ft. Mitchell. The proceeding below was not brought to require the companies, or either of them, to operate an interurban line or interurban cars, but to punish them for failing to maintain separate compartments or coaches for colored people on the street railway line and its cars actually in operation. We are not concerned with any imaginary operation, or some kind of operation which the plaintiffs in error could or should carry on. The question is whether the application of the Kentucky Separate Coach Law to the actual operation of the plaintiffs, is an unreasonable interference with or burden upon interstate commerce.

Furthermore, as we shall see, this law, even if applied to an interstate interurban road over the route in question, would be invalid.

THE SOUTH COVINGTON COMPANY ENGAGED IN INTERSTATE COMMERCE.

The record in this case shows that all the cars on the Ft. Mitchell line were operated by a continuous trip, for a single fare, in charge of the same crew, from Fountain Square or thereabouts in the City of Cincinnati, Ohio, to the end of the line in the State of Kentucky, at the Buttermilk Pike; also that this operation was carried on by the South Covington Company. (R., 30 *et seq.*, also 35.)

The particular car, No. 309, upon whose operation the Commonwealth based its proof of this indictment, was operated by continuous trip over the route just described.

It is also established by the record that of the passengers carried on the Ft. Mitchell line, 80% are carried between Cincinnati, Ohio, and some point in the State of Kentucky.

It is not necessary to argue that the South Covington System, this particular line and this particular car were engaged in interstate commerce.

The decision of this court in *South Covington & Cincinnati Street Railway Co.* v. *Covington*, 235 U. S., 537, disposes of this question.

THE SEPARATE COACH LAW A DIRECT AND UNREASONABLE REGULATION OF INTERSTATE COMMERCE.

The Separate Coach Law, as applied by the court below in this case, is a direct and unreasonable regulation of Interstate Commerce.

Every car on the line in question is an interstate car and eighty per cent. of the passengers are interstate passengers. The particular car, No. 309, upon whose operation the indictment and conviction are based, was an interstate car. In any event, the law as applied by the court below, would require a separate coach or compartment on any interstate car operated on the Fort Mitchell line, even if separate local facilities had been furnished on the line.

In *South Covington & Cincinnati St. Ry. Co.* v. *Covington*, 235 U. S., 537, the court had under consideration an

ordinance of the City of Covington which regulates the number of passengers to be carried on the cars of the Street Railway Company; the number of cars to be operated and the temperature to be maintained on the cars. It was held that the cars were engaged in interstate commerce and therefore that the ordinance was in violation of the Federal Constitution. The court said on page 547:

> "If Covington can regulate those matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall* v. *DeCuir*, 95 U. S., 485, 489, 'commerce can not flourish in the midst of such embarrassments.'"

So in the case at bar, if Kentucky can regulate these matters so can Ohio. As a matter of fact it so happens that Ohio has a statute which is inconsistent. Sec. 12940 of the General Code of Ohio is as follows:

> "Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber-shop, public conveyance by land or water, theater or other place of public accommodation and amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, or being a person who aids or incites the denial thereof, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not less than thirty days nor more than ninety days, or both."

In *Hall* v. *DeCuir*, 95 U. S., 485, a statute of Louisiana required all common carriers in that state to give all persons traveling in that state equal rights and privileges in all parts of the conveyance by which the travel was conducted, without distinction on account of race or color. Defendant's intestate was the owner of a steamboat plying between New Orleans, La., and Vicksburg, Miss.; plaintiff was a person of color traveling from New Orleans to Hermitage, both within the state of Louisiana, who was refused accommodations on account of her color in the cabin specially set apart for white persons. She sued for damages under the above mentioned statute and recovered a judgment. Defendant claimed that the statute was void as to him, in respect to the matter complained of, because it was an attempt to "regulate commerce among the states." This court held that it was such an attempt and reversed the judgment.

The court said on pp. 488, 489:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, can not but af-

> fect in a greater or less degree those taken up without and brought within and sometimes those taken up and put down without."

Also on page 489:

> "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce can not flourish in the midst of such embarrassments."

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co.* v. *Illinois,* 177 U. S., 514, the court held unconstitutional a statute of Illinois requiring every railroad corporation to stop all regular passenger trains at county seats. It was suggested in support of the law, that the statute being operative only in the state of Illinois did not directly affect interstate commerce, but the court said on page 522:

> "While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall* v. *DeCuir,* 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * *

> If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others.' The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and draw-bridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

In *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S., 388, the Railroad Company was indicted in the Kentucky courts under the statute here involved for a failure to furnish a separate coach or compartment for colored people. There was a conviction and an appeal to the Court of Appeals which held, 21 Ky. Law Rep., 228, following its decision in *Railroad Company* v. *Lander*, 20 Ky. Law Rep., 913, that the law applied only to transportation within the state. On error to this court, it was held by this court that in view of the construction put upon the law by the Kentucky Court of Appeals, the law was not a regulation of interstate commerce.

The court said (179 U. S., 390).

> "Of course, this law is operative only within the state. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville,

Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the state. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the state, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other states."

In the case at bar, however, the application of the law by the court below, to the facts of this case makes it a regulation of interstate commerce and it is therefore in violation of the Federal Constitution.

The conditions under which the street railway operates, its short trips, the preponderance of interstate passengers, the other circumstances set forth in the record and the incidents common to all street railway operation, differentiate this case from the Chesapeake & Ohio case, and preclude the application to this case of the observations made by the court in the language just quoted. It would not be practicable for this company to attach or detach a separate coach at the state line, or to otherwise comply with the law without directly affecting the travel of its interstate passengers.

(a) It would be impracticable to attach to the interstate cars, when they reach the Kentucky side of the state line, an additional car, and to detach it when reaching that line on the return trip. The state line itself is crossed on the Suspension Bridge. The territory near the bridge is in the heart of the business and residence

district of Covington. The maintenance of the necessary yards and side tracks for such purpose and in such place would be an unreasonable burden, in view of the facts that the entire trip from Cincinnati to the end of the line is only about six miles; eighty per cent. of the travel is interstate; not over six per cent. of the passengers are colored and on many trips there are no colored passengers; the very essence of street car travel is speed, cars at frequent intervals, and low fares. The attachment of an additional car, in the midst of a six mile continuous trip, for the accommodation of the inconsiderable proportion of the small percentage of intrastate passengers would be an intolerable burden—financially and from the standpoint of operation—upon the normal and desirable street car traffic.

In the case of a steam railroad, with the interstate trains making long journeys; with trains always composed of several cars; with engines always having capacity to draw additional cars; with cars of sufficient length to make the establishment of separate compartments easy; with stations or junction points near the state line where there are facilities for the change or addition of equipment, the situation is entirely different.

The State of Kentucky has recognized the essential differences between street railway and other railway traffic, because it does not require separate coaches or compartments for colored people on even intra-state street railways. Yet the courts of Kentucky have so construed the law as to impose that requirement on this street railway line, because a part of the right of way traveled by the street cars belongs to the Erlanger Company, which the court has held is an interurban company.

(b) If the separate coach or compartment were furnished, it would in practice directly affect interstate travel.

Suppose the case of a separate car or compartment, when the car starts at the Cincinnati terminus. Any colored passenger getting on the car in Cincinnati was either a local passenger in Cincinnati or an interstate passenger, and, of course, could not be assigned to the separate car or compartment in Ohio; hence such separate car or compartment would be idle until arrival in Kentucky. In street car traffic both economy of operation and the demand for maximum capacity, especially in the rush hours, forbid waste or idle space. In the case of a colored passenger getting on a car in Kentucky for the interstate trip, assignment to a separate coach or compartment would be illegal. Yet there is no practicable way of distinguishing between interstate and intra-state passengers. Such passenger would not buy a ticket for any given station, thus indicating his destination, and permitting segregation in case of an intrastate passenger. The passenger pays a nickel and rides as far as he likes.

The only practicable course for this company to meet the requirements of this law as interpreted in this case, would be to abandon its interstate cars, and the State of Kentucky has no right to require this.

(c) The Erlanger or Fort Mitchell line is operated, and necessarily so, as a part of the general street railway system operated by the company. The cars used on that line are also used on other parts of the line and are freely exchanged back and forth; they are simply the ordinary street cars of the company assigned from time to time to this particular line. Universal transfers

are given to other lines in the system; the same fare is charged and the business of the line is not confined to the carriage of passengers to and from points on the Ft. Mitchell line outside of the City of Covington, but extends to the carriage of passengers between Cincinnati and points in Covington along the route followed by the line in question. In other words, the line does not differ in any respect from any other part of the system and the company's right to so operate has never been questioned, yet the application of the separate coach act in this case is to require separate compartments or separate coaches on a particular part of the street railway system, and not to require it on the other and greater part of the system where the conditions are exactly the same, so far as equipment and operation are concerned.

In emphasizing the difference between the line actually operated by the South Covington Company and an interurban line, we do not mean to concede that the law would be valid if applied to the operation of an interurban car over the same route as is here involved. We think that in the main the same considerations would apply. But we have—perhaps in too great detail—shown that the actual operation here is a street railway operation, because we desire the court to consider this case upon the facts as they actually are, and not upon the theory apparently adopted by the Court of Appeals of Kentucky that the case deals with an interurban line.

We have shown that the application of the law in this case is wholly different from the application which was

made and upheld by this court in the case of *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S., 388, *supra*.

We have cited authorities hereinabove on the proposition that the question whether the statute is an invalid regulation of interstate commerce will be determined by this court upon the application of the statute made by the state courts to the facts in a particular case and that the law might escape condemnation as applied in one case, such as *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, above, and yet be held to be a violation of the commerce clause of the Federal Constitution as interpreted and applied in another case, such as the case at bar.

THE CASE OF THE CINCINNATI, COVINGTON AND ERLANGER RAILWAY COMPANY.

While the indictment against the Erlanger Company accuses it of the offense of unlawfully operating a line of railroad without providing separate coaches or compartments for colored people, the specifications in the indictment (R., 758, p. 1, *et seq.*) charged only that it leased its road to the South Covington Company with knowledge that the latter company would operate it without such separate coaches or compartments.

The evidence shows (R. 757, p. 20, *et seq.*) that the Erlanger Company never had any cars or power house, never operated any cars of any kind over its tracks, and that the only cars ever operated over those tracks were the cars of the South Covington & Cincinnati Street Ry. Co., to which we have already referred in detail.

The indictment and conviction of the Erlanger Company is upon the theory set forth in the opinion of the

court below on page 55 of the record in the South Covington case, No. 757, as follows:

> "The evidence is, also, such as to prove, that the Cincinnati, Covington & Erlanger Railway Company, either turned over its road to the Street Railway Company, with full knowledge that it would be operated contrary to law and for the purpose of the road being so operated, or else the two companies are jointly engaged in the operation of the railway. In either event it being conclusive, that the operation is being unlawfully made by the authority of the Cincinnati, Covington & Erlanger Railway Company. Under the facts proven, it is impossible to conclude, that the road is being unlawfully operated, without the full concurrence of the latter company, and it is therefore amenable to penalty, which is denounced in the statute."

Obviously the judgment against the Erlanger Company could not stand if this court should reverse the judgment of the court below in the South Covington case. If the South Covington Company had a right to operate its interstate cars as it did, without separate accommodations for colored people, the Erlanger Company can not be punished for merely consenting to or acquiescing in such operation.

We respectfully submit that the judgment in each case should be reversed.

J. C. W. Beckham,
Richard P. Ernst,
Alfred C. Cassatt,
Frank W. Cottle,
Attorneys for Plaintiffs in Error.